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No. 82-628

In the Supreme Court of the United States

OCTOBER TERM, 1982

ENERGY RESERVES GROUP, INC., ET AL., PETITIONERS

v.

DONALD PAUL HODEL, SECRETARY OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld regulations of the Department of Energy prohibiting the inclusion of non-producing "injection" wells for purposes of applying the statutory exemption from petroleum price controls for properties with an "average daily production" per well of 10 barrels or less of crude oil.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Statutes and regulations involved	2
Statement	2
Argument	6
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Commissioner v. *Estate of Noel*, 380 U.S. 678	11
E. I. du Pont de Nemours & Co. v. *Collins*, 432 U.S. 46	14
Fidelity Federal Savings & Loan Association v. *de la Cuesta*, No. 81-750 (June 28, 1982)	16
Haig v. *Agee*, 453 U.S. 280	11
Lorillard v. *Pons*, 434 U.S. 575	11, 12
Mourning v. *Family Publications Service, Inc.*, 411 U.S. 356	14-15
North Haven Board of Education v. *Bell*, No. 80-986 (May 17, 1982)	14
Rowan Cos. v. *United States*, 452 U.S. 247	13
Sauder v. *Department of Energy*, 4 Energy Mgmt. (CCH) ¶ 26,157, aff'd, 648 F.2d 1341	11
Tully v. *Mobil Oil Corp.*, 455 U.S. 245	7
United States v. *Calamaro*, 354 U.S. 351	13
Wiggins Brothers, Inc. v. *Department of Energy*, 667 F.2d 77, cert. denied, No. 81-1191 (Mar. 29, 1982)	7

Statutes:

Administrative Procedure Act, 5 U.S.C. 553	5
Economic Stabilization Act of 1970, 12 U.S.C. 1904 note	2, 7
Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627 *et seq.*	2, 9

Statutes—Continued

	Page
Energy Conservation and Production Act, Pub. L. No. 94-385, 90 Stat. 1125 *et seq.*	4
Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 *et seq.*	4
Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, Section 406, 87 Stat. 590	2, 9
Pub. L. No. 93-511, 88 Stat. 1608	11
Pub. L. No. 94-99, 89 Stat. 481	11
Pub. L. No. 94-133, 89 Stat. 694	11
26 U.S.C. (Supp. V) 4991(d)(1)(A)	7
Miscellaneous:	
Exec. Order No. 12287, 46 Fed. Reg. 9909 (1981)	5
Communication from the Administrator, Federal Energy Administration, H.R. Doc. No. 94-159, 94th Cong., 1st Sess. (1975)	12
38 Fed. Reg. 32494 (1973)	3
41 Fed. Reg. (1976)	
p. 48319	5
p. 48323	5
H.R. Rep. No. 93-624, 93d Cong., 1st Sess. (1973)	2, 9, 10
H.R. Rep. No. 93-748, 93d Cong., 1st Sess. (1973)	7
Ruling 1974-29, 34 Fed. Reg. 44414 (1974)	4, 5, 8, 12, 15
S. Rep. No. 92-507, 92d Cong., 1st Sess. (1971)	7
S. Rep. No. 94-1119, 94th Cong., 2d Sess. (1976)	14

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 690 F.2d 1375. The opinion of the district court (Pet. App. 33a-110a) is reported at 520 F. Supp. 1232.

JURISDICTION

The judgment of the court of appeals (Pet. App. 217a) was entered on July 29, 1982. A petition for rehearing was denied on September 10, 1982 (Pet.

App. 219a). The petition for a writ of certiorari was filed on October 8, 1982. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. 1904 note, and 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent statutory and regulatory provisions are set forth at Pet. App. 221a-227a.

STATEMENT

1. In August 1973, the Cost of Living Council imposed price controls for crude oil and other petroleum products, pursuant to the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note. The controls were imposed in an effort to halt the inflationary spiral caused by rapidly rising domestic oil prices (Pet. App. 8a). Several months later, in November 1973, Congress enacted an exemption from price controls for crude oil produced from "stripper wells," defined as properties with an "average daily production * * * per well" of not more than 10 barrels of crude oil or natural gas liquids.[1] Congress directed the agency responsible for implementing the price control program to issue regulations implementing the stripper well exemption. The conferees stated that the exemption was to be "narrowly defined and prudently administered." H.R. Rep. No. 93-624, 93d Cong., 1st Sess. 29 (1973).

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[1] The exemption originally was enacted in 1973 as Section 406 of the Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 590. Shortly thereafter, the exemption was made part of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627 *et seq.*, which became the statutory authority for the entire petroleum price control program.

On November 21, 1973, the Cost of Living Council issued a regulation implementing the stripper well exemption. The regulation provided in part that only "wells which produced crude petroleum and petroleum condensates" could be counted in calculating "average daily production." 38 Fed. Reg. 32494 (1973); Pet. App. 223a. Members of the petroleum industry argued that the agency also should allow inclusion of non-producing wells, such as injection wells, in the calculation of average daily production.[2] Injection wells do not emit crude oil, but rather are used to inject water (or other material, such as gas or steam) into the ground to maintain reservoir pressure, which aids in crude oil production from other wells. Inclusion of such non-producing wells would have had the effect of lowering average daily production per well, thus significantly increasing the number of properties that would have qualified for the exemption from price controls.[3] In December 1974, following numer-

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[2] Various types of wells may exist on producing properties. In addition to producing wells, which emit crude oil, there may be shut-in wells (wells that have been closed down and are no longer producing) and salt water disposal wells (used to dispose of salt water emitted with crude oil). Other types of wells are used in connection with secondary recovery projects, which use various artificial means to increase the amount of production from a reservoir. These wells include injection wells (used to inject fluids into the reservoir, thereby increasing pressure underground), water source wells (used to obtain water for injection purposes), and observation wells (used to determine whether injected fluid is moving properly in the underground reservoir). See C.A. App. 9082, 9094, 9233, 9419, 9424, 9900-9903, 10013-10014. ("C.A. App." refers to the joint appendix filed in the court of appeals).

[3] As the court below explained, "[i]nclusion of injection wells in the calculation of average daily production would en-

ous comments and inquiries by the industry, the agency[4] issued Ruling 1974-29 (39 Fed. Reg. 44414 (1974); Pet. App. 226a-227a). The Ruling was designed to "put firmly at rest" (*id.* at 154a) the agency's official position that only producing wells could be used to calculate average daily production for purposes of exemption from price controls. The Ruling specified that all non-producing wells were to be excluded from the calculation, including injection wells, shut-in wells, disposal wells, dry wells, and spent wells (*id.* at 227a).

The stripper well exemption was repealed for a brief period during 1976.[5] However, in August 1976, Congress reenacted the exemption as part of the Energy Conservation and Production Act, Pub. L. No. 94-385, 90 Stat. 1125 *et seq.* At that time Congress specifically rejected attempts to enlarge the exemption in a manner that would have allowed inclusion of injection wells in the well count for purposes of calculating average daily production (Pet. App. 17a). Thereafter, following a period for notice and comment, the agency adopted a stripper well regulation that was substantially identical to the earlier regula-

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able a producer to divide his total production from a property by a greater number of wells, thereby allowing more production to qualify for the exemption by falling under 10 barrels per day per well" (Pet. App. 13a n.5).

[4] The term "agency" when used in this brief refers to the Department of Energy and its predecessors, including the Federal Energy Administration and the Federal Energy Office. These agencies took over from the Cost of Living Council the responsibility for administering the petroleum price control program.

[5] Congress repealed the exemption in December 1975 in the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 *et seq.*

tion. 41 Fed. Reg. 48319, 48323 (1976); Pet. App. 225a-226a.

On January 28, 1981, President Reagan removed price controls for crude oil and refined petroleum products. Exec. Order No. 12287, 46 Fed. Reg. 9909.

2. In late 1976 and early 1977, three cases were filed in the United States District Court for the District of Kansas challenging the agency's interpretation of the stripper well exemption.[6] The district court consolidated the three cases. In January 1978, it entered summary judgment against the agency on the ground that Ruling 1974-29 was "legislative" in nature and therefore was procedurally invalid because it had been issued without use of the notice and comment procedures prescribed by the Administrative Procedure Act, 5 U.S.C. 553. *Energy Reserves Group, Inc.* v. *Federal Energy Administration*, 447 F. Supp. 1135 (D. Kan. 1978) (Pet. App. 111a-138a). In October 1978, the Temporary Emergency Court of Appeals (TECA) reversed on the ground that the Ruling was clearly interpretative, rather than legislative, so that the notice and comment procedures of the Administrative Procedure Act did not apply. *Energy Reserves Group, Inc.* v. *Department of Energy*, 589 F.2d 1082 (Pet. App. 139a-195a). Judge Becker, who authored the lead opinion, observed that the Ruling was a "reasonable contemporaneous construction" of the statute (*id.* at 168a). In a subsequent decision denying a petition for writ of mandamus, *Duncan* v. *Theis*, 613 F.2d 305 (1979) (Pet. App. 205a-216a), the TECA concluded that the con-

[6] A number of challenges to the agency's interpretation of the stripper well exemption were filed in other courts. In June 1979, the Judicial Panel on Multidistrict Litigation transferred those actions to the District of Kansas for consolidation with the cases pending there (Pet. App. 39a).

formity of the regulation with the statute was an issue still to be resolved, but it characterized as "persuasive" Judge Becker's earlier suggestion that the agency's regulation and interpretation reflected a reasonable construction of the statute (*id.* at 211a-212a).

3. On remand, the district court concluded that the stripper well regulation was outside the agency's statutory authority, since "Congress intended injection wells to be included in the well count" (Pet. App. 40a). The court went on to hold that "even if the statute did not mandate including injection wells, the manner in which the Department excluded the wells from the well count was arbitrary and capricious" (*ibid.*).

The court of appeals again reversed (Pet. App. 1a-32a). Based on a comprehensive review of the language and legislative history of the stripper well exemption, the TECA concluded that there was "clear and convincing evidence that Congress intended to include only 'wells that produced crude petroleum'" (*id.* at 25a). The TECA rejected the argument that the agency's interpretation was arbitrary and capricious, noting that there was ample justification for that interpretation (*id.* at 25a-32a).

ARGUMENT

1. The decision below raises no question that warrants review by this Court. The TECA has decided a narrow issue of statutory construction relating to a specialized program of petroleum price controls. Petitioners, members of the regulated industry, simply disagree with the TECA's conclusion that the interpretation of the agency that administers the statute is reasonable and instead advance their own interpretation. The issue is unlikely to recur, because the

petroleum price controls were discontinued almost two years ago. See page 5, *supra*.[7] Nor are there likely to be conflicting decisions on this issue, because cases formerly pending around the country were transferred to the district court below and consolidated. See page 5 n.6, *supra*. The court that rendered the unanimous decision challenged by petitioners was established by Congress specifically to ensure expert and uniform treatment of issues such as the one raised here.[8] See *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245 (1982). The TECA has considered carefully and thoroughly petitioners' challenges to the agency's interpretation and has concluded in the decision below and in other decisions that the agency's regulation is reasonable.[9] There is no need for further review.

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[7] Petitioners argue (Pet. 15) that this case has significance for the future because the effect of the windfall profit tax depends in part on the definition of "stripper well property within the meaning of the June 1979 energy regulations," referred to in 26 U.S.C. (Supp. V) 4991(d)(1)(A). But the outcome of this case does not affect the meaning of the regulatory definition; rather, the issue here is whether that definition is consistent with the statutory stripper well exemption. Even if the court below had found the agency's regulatory interpretation to be invalid, this would not change the fact that Congress has adopted it for the separate purpose of the windfall profit tax.

[8] See 12 U.S.C. 1904 note; S. Rep. No. 92-507, 92d Cong., 1st Sess. 10-11 (1971); H.R. Rep. No. 93-748, 93d Cong., 1st Sess. 12-13 (1973).

[9] See Pet. App. 1a-32a; *id. at* 139a-195a; *id.* at 205a-216a; see also *Wiggins Brothers, Inc.* v. *Department of Energy*, 667 F.2d 77, 89 (Temp. Emer. Ct. App. 1981), cert. denied, No. 81-1191 (Mar. 29, 1982).

Petitioners suggest (Pet. 17) that they have been denied the opportunity to address the validity of the agency's con-

2. In any event, the decision of the TECA is clearly correct. Congress expressly delegated to the agency the authority to issue regulations implementing the stripper well exemption. See Pet. App. 221a-223a. The agency issued both regulations and a 1974 ruling explaining how the exemption would be administered. The TECA correctly concluded that the agency's consistent interpretation of the exemption in a manner that excluded injection wells and other non-producing wells from the well count used to calculate average daily production was in accord with the language and history of the statute.[10]

The plain words of the statute support the agency's interpretation. The stripper well exemption applies to properties with an "average daily production * * * per well" of not more than 10 barrels of crude oil or natural gas liquids. See Pet. App. 221a-223a. The statute makes no mention of injection wells. The language strongly suggests that Congress was referring only to those wells that actually produce, or emit, crude oil. As the TECA observed, a "reasonable read-

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struction of the statute. On the contrary, petitioners have had several opportunities to address this issue, and the court below has considered their arguments carefully on each occasion. The TECA's decision on its face negates petitioners' claim.

[10] Petitioners note (Pet. 6) the district court finding that on some occasions in 1973 agency personnel responded to requests from industry members by stating that injection wells were to be included in the well count. Assuming, arguendo, the correctness of the finding, these instances occurred prior to the issuance of Ruling 1974-29. Moreover, the district court conceded that "the bulk of the advice given by the agency was to the effect that injection wells should not be counted" (Pet. App. 67a). The district court cited no instance of a published agency interpretation that conflicted with Ruling 1974-29.

ing would distinguish injection from producing wells" (*id.* at 31a).[11]

The agency's interpretation also is more consistent with legislative intent than that of petitioners. When Congress first enacted the exemption the conferees explained that stripper wells were defined as those "wells whose average daily production does not exceed ten barrels per well." H.R. Rep. No. 93-624, 93d Cong., 1st Sess. 29 (1973). The purpose of the exemption from price controls was to avoid any shutdown of production from this particular group of wells. *Ibid.* There is no indication that Congress meant to extend the exemption to apply to wells with higher production rates merely because injection processes were used to maintain those rates. Rather, the conferees stressed that the exemption "is not intended to confer any benefit on the owners and operators of wells producing in excess of ten barrels per day." *Id.* at 30. Like the statute itself, the legislative history contained no mention of injection wells.

The conferees made clear that the exemption was intended to be "narrowly defined and prudently administered" and that they wished to insure that "the incentive being granted is properly limited in accord

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[11] Petitioners suggest (Pet. 4) that other federal agencies do not differentiate between injection wells and producing wells in certain contexts. Assuming, arguendo, that petitioners have characterized correctly the practices of other federal agencies, those practices are not material to the interpretation of the statutory exemption at issue here. The TECA, in an earlier decision in this case, correctly dismissed the cited practices as "unpersuasive" and as "immaterial and obscure references, unmentioned in any legislative history of [the Emergency Petroleum Allocation Act] or of [the Trans-Alaska Pipeline Authorization Act] * * *" (Pet. App. 168a-169a).

with congressional intent." H.R. Rep. No. 93-624, *supra*, at 29. In the same vein, the conferees stated (*id.* at 30):

> The Congress intends that the provisions of this section will be strictly enforced and regulated by the administering agency to insure that the limited exemption of this class of wells for the express purpose described * * * is not in any way broadened.

These statements from the conference report establish clearly that Congress intended that the exemption be construed narrowly and that it charged the agency with administering the exemption in a manner that would preserve its limited nature. The expansive reading urged by petitioners is directly contrary to these expressions of legislative intent.[12]

The agency's interpretation of the stripper well exemption also is consistent with Congress's intention that the regulations be designed to "insure that an administratively workable system is established which does not permit abuse." H.R. Rep. No. 93-624, *supra*, at 31. See also *id.* at 30 (stating that the regulations "shall be so designed as to provide safeguards against any abuse, over-reaching or altering

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[12] Statements made by various legislators reflect an expectation that the exemption would apply to only a small percentage of the nation's crude oil production (Pet. App. 23a-24a). The TECA found that "the amount of oil subject to the exemption under [petitioners'] interpretation is much greater than originally anticipated and intended" (*id.* at 24a). Petitioners argue (Pet. 12 n.3) that this conclusion is based on misunderstanding of a statement by petitioners' counsel during oral argument. Even if this were so, petitioners' own representations concerning the amount of money involved in this litigation (*id.* at 2, 14) suggest the magnitude of the exemption they seek.

of normal patterns of operations to achieve a benefit under this section which would not otherwise be available"). Various types of wells found on producing properties may be necessary for the production of oil.[13] It is virtually impossible to measure the contribution to production made by any of these wells, including injection wells. See C.A. App. 9912. Furthermore, even when injection wells initially operate to enhance production from other wells, they may thereafter become unnecessary and contribute nothing to production. See *id.* at 9095, 9602, 9900, 9912-9913. Thus, the agency's conclusion that only producing wells should be used in determining eligibility for the stripper well exemption was consistent with the congressional goals of both administrative workability and prevention of abuse.

Moreover, as the TECA correctly concluded, Congress's re-enactment of the stripper well exemption without change in 1976 indicates approval of the agency's interpretation.[14] See, *e.g.*, *Haig* v. *Agee*, 453 U.S. 280, 300-301 (1981); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *Commissioner* v. *Estate of Noel*, 380 U.S. 678, 681-682 (1965). The re-enactment here was not simply a case of congressional inaction.

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[13] In other litigation, the industry has sought to include other types of non-producing wells—shut-in wells and salt-water disposal wells—in the well count for purposes of the stripper well exemption. See, *e.g.*, *Sauder* v. *Department of Energy*, 4 Energy Mgmt. (CCH) ¶ 26,157 at 27,389 (D. Kan. July 9, 1979), aff'd, 648 F.2d 1341 (Temp. Emer. Ct. App. 1981).

[14] As the TECA noted (Pet. App. 25a), Congress also had extended the Emergency Petroleum Allocation Act on three previous occasions without disturbing the agency's interpretation of the exemption. See Pub. L. No. 93-511, 88 Stat. 1608; Pub. L. No. 94-99, 89 Stat. 481; Pub. L. No. 94-133, 89 Stat. 694.

Rather, Congress specifically rejected an attempt by Senator Bartlett to amend the statute by defining the term "well" to include injection wells (Pet. App. 17a). The TECA concluded, "[b]y these actions, we believe Congress spoke loudly, clearly and unequivocally that its intention was not to enlarge or expand upon the 'narrowly defined and prudently administered' exemption which it had originally mandated in the TAPAA Conference Report" (*id.* at 25a).

Petitioners' suggestion (Pet. 7, 19 n.8) that Congress was not aware of the agency's interpretation at the time it reenacted the exemption in 1976 in simply incorrect. Ruling 1974-29 was an official agency action published in the Federal Register and had been a matter of public record for over a year and a half when Congress reenacted the exemption. Thus, it can be presumed that Congress was aware of the interpretation. See *Lorillard* v. *Pons*, *supra*, 434 U.S. at 581. Moreover, in this case the agency's interpretation was specifically called to Congress's attention. The record contains congressional correspondence from 1974 and 1975 relating to complaints about the agency's exclusion of injection wells from the well count for purposes of the stripper well exemption. See C.A. App. 10599, 10604-10605, 10641-10642, 10647, 10680-10681, 10780, 11159, 11255-11261, 11631, 11633, 11652-11657, 11659. Moreover, the agency referred to its interpretation in a communication to Congress prior to the passage of the 1976 legislation. See *Communication from the Administrator, Federal Energy Administration*, H.R. Doc. No. 94-159, 94th Cong., 1st Sess. 3, 5 (1975). Finally, the unsuccessful attempt by Senator Bartlett in 1976 to amend the statute in a manner that would have reversed the agency's interpretation indicates that Congress was not only aware of the issue raised

by petitioners; it resolved it definitively in favor of the agency's position.[15]

Petitioners urge (Pet. 24-26) that the agency's interpretation must be incorrect because Congress intended to use the stripper well exemption to encourage use of secondary recovery techniques. Neither the language of the statute nor its history indicates that this was the purpose of the exemption. In fact, when Congress reenacted the exemption in 1976, it drew a sharp distinction between stripper well production, on the one hand, and secondary recovery techniques, such as the use of injection wells, on the other. In rejecting a Senate provision that would have allowed price increases for such secondary recovery projects the conferees stated:

> The conferees could not * * * agree to the provisions of the Senate amendment which would permit substantial price increases for commonplace secondary enhancement techniques such as water flooding and gas displacement. Moreover, the conferees did not believe it wise to attempt to create in rigid statutory language a special classification of domestic production which would be freed of price restraints. Unlike the case of stripper well production, for which there is both a long legislative and administrative history,

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[15] This case is clearly distinguishable from *Rowan Cos.* v. *United States*, 452 U.S. 247 (1981), and *United States* v. *Calamaro*, 354 U.S. 351 (1957), cited by petitioners (Pet. 19 n.8). In those cases there was no evidence that the interpretations at issue had been brought to Congress's attention. See *Rowan Cos.* v. *United States*, *supra*, 452 U.S. at 262; *United States* v. *Calamaro*, *supra*, 354 U.S. at 359. Moreover, in *Rowan*, unlike the present case, the Internal Revenue Service had issued formal rulings that were inconsistent with the disputed interpretation. 452 U.S. at 260-261.

> there is not common agreement as to the practicality, feasibility or cost-effectiveness of the various enhancement techniques employed throughout the industry.

S. Rep. No. 94-1119, 94th Cong., 2d Sess. 71 (1976); Pet. App. 16a. Both the original legislative history and the 1976 congressional action indicate that the stripper well exemption cannot be read as an open-ended mandate to encourage use of secondary recovery techniques. Rather, the exemption was designed to be a very limited exception to a broad regime of price controls. In declining to read the exemption in the expansive manner urged by petitioners, the agency has acted consistently with legislative intent.[16]

This Court has held on a number of occasions that considerable weight should be given to the interpretation of the agency charged with administering a statute. See, *e.g.*, *North Haven Board of Education* v. *Bell*, No. 80-986 (May 17, 1982), slip op. 9 n.12; *E. I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977). Particular weight should be given to the agency's interpretation when, as in this case, Congress has delegated to the agency the authority to promulgate regulations implementing the statute. See, *e.g.*, *Mourning* v. *Family Publications Service*,

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[16] Amici, the States of Texas, Oklahoma, and Wyoming, suggest that the decision of the court below will somehow interfere with their efforts to encourage producers of crude oil to use secondary recovery techniques. Since petroleum price controls were removed almost two years ago, there can be no effect on such current or future efforts by states. Moreover, nothing in the TECA's decision in any way prevents states from continuing or expanding their own programs of incentives.

Inc., 411 U.S. 356, 369 (1973).[17] Here, the TECA, after carefully reviewing the language and history of the stripper well exemption and the agency's interpretation of that exemption, concluded that the agency's regulations were reasonable. That conclusion is correct, and no further review is warranted.[18]

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[17] Petitioners argue (Pet. 20-22) that the agency's interpretation is not entitled to deference in this case, on the ground that the agency gave inadequate consideration to the treatment of injection wells. In light of the emergency nature of the petroleum price control program, there was justification for the failure to follow notice and comment procedures when the regulations were first issued. See Pet. App. 137a. During the following year the agency gave thorough consideration to arguments that injection wells should be included in the well count. See, *e.g.*, Pet. App. 67a-68a; C.A. App. 11257-11258. As the TECA found, the agency's conclusion was fully consistent with the language, history, and purpose of the exemption.

[18] Petitioners suggest (Pet. 15-16) that the TECA failed to rule on the validity of the agency's regulations, as opposed to the validity of Ruling 1974-29. That suggestion is incorrect. The court specifically referred to both the regulations and the Ruling (Pet. App. 7a, 32a). The court held unequivocally that "[*t*]*he stripper well regulations*, as interpreted by Ruling 1974-29, are neither arbitrary nor capricious" (*id.* at 32a) (emphasis added).

Petitioners also argue (Pet. 18-19) that the TECA did not take sufficient account of the findings of fact of the district court. This contention is without merit. The question of whether the agency's interpretation of the stripper well exemption was consistent with the statute or was arbitrary and capricious is a legal issue. Thus, any findings of fact were largely irrelevant to the TECA's conclusion. Moreover, the district court's finding that abuse of the stripper well exemption was unlikely (Pet. App. 84a) is not inconsistent with the TECA's conclusion (*id.* at 21a-23a, 30a-31a) that Congress was concerned with the potential for abuse and that

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1982

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the agency could issue regulations that would minimize the possibility that such abuses would occur. Even if there may be differences of opinion concerning the likelihood of abuses, it is surely within the agency's discretion to conclude that a particular approach should be adopted in part because it would prevent any possible abuse. See, *e.g.*, *Fidelity Federal Savings & Loan Association* v. *de la Cuesta*, No. 81-750 (June 28, 1982), slip op. 26-27.

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